APPENDIX A.

FRANK L. TODD, et al., Plaintiffs-Appellees, v. JIM McNEFF, INC., a California corporation, Defendant-Appellant. No. 80-5214.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Oct. 8, 1981. Decided Feb. 8, 1982.

Trustees brought action to recover fringe benefit contributions owed by employer. The United States District Court for the Central District of California, Irving Hill, J., granted relief, and employer appealed. The Court of Appeals, Nielsen, District Judge for the Southern District of California, sitting by designation, held that: (1) prehire agreements are enforceable until repudiated by the employer; (2) employer's failure to perform contractual obligations did not amount to a repudiation; and (3) issue of coercion in the prehire agreement must be raised by repudiation and cannot be raised once an action to enforce has been brought.

Affirmed.

Appeal from the United States District Court for the Central District of California.

Before TANG and BOOCHEVER, Circuit Judges, and NIELSEN,* District Judge.

NIELSEN, District Judge:

This case arises under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185. Trustees of certain trust funds created pursuant to 29 U.S.C. § 186(c), filed this action to recover fringe benefit contributions allegedly due and owing by the terms of a collective bargaining agreement. The following facts are uncontroverted in the record.

---

*Honorable Leland C. Nielsen, United States District Judge for the Southern District of California, sitting by designation.

On September 13, 1978, Jim McNeff, Inc. (McNeff, Inc.) was employed as a subcontractor on a jobsite. Jim McNeff, President of McNeff, Inc. was approached by a union representative who informed him that he would have to sign the Master Labor Agreement for the Union (International Union of Operating Engineers, Local No. 12) or leave the job. When Jim McNeff refused, the representative left and returned with the prime contractor, who also informed McNeff that he would have to sign the Agreement if he wanted to continue on the site. McNeff then signed the Agreement, although he claims he has never read it, nor did he ever intend to abide by its terms. At that time, McNeff, Inc. employed three workers. All signed union representative cards the same day.

According to the terms of the Agreement, McNeff, Inc. was required to make contributions to the trust fund for each covered employee. Each month from October, 1978, through March, 1979, McNeff, Inc. submitted to appellees a report stating that "no members of this craft were employed during the month," and remitting no contributions. In November, 1978, trustees asked permission to audit the company's records. After several postponements due to appellant's requests, on April 4, 1979, this action was filed. When the audit was carried out, the trustees found that covered employees had in fact been employed, and that contributions in the amount of $5,316.79 were due under the terms of the contract for five employees that had been employed prior to the filing of the suit.

The trustees also filed unfair labor practice charges with the N.L.R.B. The General Counsel declined to prosecute the case on the ground that a full collective bargaining relationship had never been established.

In the District Court, the Court granted summary judgment for the trustees, and McNeff, Inc. has appealed.

The labor contract in this case is one under Section 8(f) of the National Labor Relations Act (29 U.S.C. § 158[f]). This section is an exception to the general labor policy that an employer can only enter into a collective bargaining relationship with a union that represents a majority of the employer's employees. As jobs begin and end, construction workers frequently change employers. Due to this, Congress has seen fit to allow so-called "prehire" agreements in that industry. These agreements may be signed before the union represents a majority of the employer's employees, and may continue in duration through more than one of the employer's jobs, even if the employer goes through a high employee turnover. These agreements allow the employees some of the wage and benefit advantages of union representation, as well as relative wage stability. The employer is assured a qualified pool of workers to choose from when it needs them, protection against labor unrest during the period of the contract, and predictable labor costs, an invaluable tool in the bidding process.

The major issue in this case is the enforceability of these pre-hire agreements. Although these agreements are legal by virtue of § 8(f), they do not mature into full collective bargaining agreements until the union has actually succeeded in convincing a majority of the employer's employees to be represented by the union. *Ruttman Construction Company*, 191 N.L.R.B. 701, 702 (1971). The Supreme Court approved this position in *N.L.R.B. v. Local Union No. 103, Iron Workers (Higdon Construction Company)*, 434 U.S. 335, 345, 98 S.Ct. 651, 657, 54 L.Ed. 586 (1978). In *Higdon*, the employer refused to abide by the terms of a pre-hire agreement on one of its jobs, and the union picketed the jobsite for more than 30 days. The employer filed unfair labor practice charges with the N.L.R.B. under § 8(b)(7)(C) of the N.L.R.A., which forbids picketing by

a union which is not the authorized bargaining representative unless the union petitions the Board for a representation election within 30 days. The Supreme Court reversed the Circuit Court and reinstated the N.L.R.B. decision that the picketing was in fact an unfair labor practice. The Court held that a § 8(f) pre-hire agreement is only a preliminary step in the creation of a collective bargaining relationship, and that the relationship only matures at such time as the union achieves majority status. Until then, the contract is voidable. 434 U.S. at 341, 98 S.Ct. at 655. Since the *Higdon* decision, the lower federal courts have split into three groups on the issue of what is the correct interpretation of the Supreme Court's statement that these contracts are voidable.

The most restrictive reading of *Higdon* is that it was only intended to deal with the interface between § 8(f) and § 8(b)(7). Under this view, *Higdon* is only applicable to unfair labor practice cases, and in cases such as this one, brought by trustees of fringe benefit funds for back payments, § 8(f) agreements are fully enforceable under all circumstances. Heavy reliance is placed upon *Lewis v. Benedict Coal Corporation*, 361 U.S. 459, 80 S.Ct. 489, 41 L.Ed.2d 442 (1960) by the courts that have adopted this approach. In *Benedict*, the Supreme Court held that a contract to pay contributions to a union pension fund was not a typical third-party beneficiary contract, in that the employer could not assert the union's breach of contract as a defense in an action by the trustees. The courts which have interpreted *Higdon* in this narrow manner do so by analogy to *Benedict*, limiting in another way the employer's right to challenge the enforceability of an agreement to make fringe-benefit contributions on a suit by the trustees.

The following courts have adopted this reasoning: The Eighth Circuit, *Contractors, Laborers, Teamsters and Engineers Health & Welfare Plan v. Associated Wrecking Co.*,

638 F.2d 1128 (8 Cir. 1981); the Tenth Circuit, *New Mexico District Council of Carpenters v. The Mayhew Co.*, 664 F.2d 215 (10 Cir. 1981); the Eastern District of Virginia, *Eastern District Council of Carpenters v. Blake Construction Co.*, 457 F.Supp. 825 (1978); and the State of Washington Court of Appeals, *Western Washington Cement Masons Health & Security Trust Funds v. Hillis Homes*, 26 Wash.App. 224, 612 P.2d 436 (1980).

The middle position relies upon the use of the word "voidable" in the *Higdon* opinion. According to this interpretation, an employer is able to exercise the right of repudiation until the union achieves majority status. A prehire agreement would therefore be fully enforceable until a repudiation, and trustees could recover in a § 301 action contributions accruing prior to the repudiation.

The Eighth Circuit apparently reconsidered the restrictive position taken in *Associated Wrecking*, and adopted this approach in *W.C. James, Inc. v. Oil, Chemical* and *Atomic Workers International Union*, 646 F.2d 1292 (8 Cir. 1981). The Middle District of Florida also espouses this view. *Florida Marble Polishers Health & Welfare Trust Fund v. Megahee*, 102 L.R.R.M. 2740 (1979).

In addition, two other courts, while rejecting the third interpretation, have found it unnecessary to choose between these first two. *Trustees of the Atlanta Iron Workers Local 387 Pension Fund v. Southern Stress Wire Co.*, 509 F.Supp. 1097 (N.D. Ga. 1981); *Western Washington Laborers-Employers Health & Security Trust Fund v. Newman*, 90 C.C.H. Labor Cases ¶ 12,379 (W.D. Wash. 1980).

The final view that some courts have taken on this question is that until the union affirmatively demonstrates majority status no contract has been formed, and a repudiation voids the contract *ab initio*. Some language in *Ruttman*,

supra, and the N.L.R.B. *Higdon* decision (*Iron Workers Local 103* [*Hidgon Construction Co.*], 88 L.R.R.M. 1067 [1975]) supports this view.

The courts which have taken this stance are a different judge in the Western District of Washington, *Western Washington Laborers-Employers Health & Security Trust Fund v. McDowell*, 103 L.R.R.M. 2219 (1979); the District of Oregon, *Vermeer v. Aloha Contractors*, 90 C.C.H. Labor Cases ¶ 12,466 (1980); and the District of the District of Columbia, *Washington Area Carpenters Welfare Fund v. Overhead Door Co.*, 488 F.Supp. 816 (1980).

The Fifth Circuit also refused to enforce a pre-hire agreement prior to a demonstration of majority support. *Baton Rouge Building and Construction Trades Council v. E. C. Shafer Construction Co.*, 657 F.2d 806 (5 Cir. 1981).

We hold that the middle ground, requiring repudiation by the employer in order to avoid the pre-hire agreement, is both the best interpretation of *Higdon* and the best implementation of the national labor policies. There is no reason to restrict the statements in *Higdon* about § 8(f) agreements generally to unfair labor practice cases. The opinion is written much more broadly than that view allows. Moreover, the N.L.R.B. *Higdon* opinion is written even more broadly, and the Supreme Court's stated reason for reinstating the N.L.R.B. opinion was that the courts should defer to the Board when it has made an acceptable reading of the statutory language. 434 U.S. at 341, 98 S.Ct. at 655.

By the same token, it goes too far to hold these contracts unenforceable without a repudiation. The Supreme Court used the word "voidable", not "void" in *Higdon*. 434 U.S. at 341, 98 S.Ct. at 655. At least some members of Congress have criticized *Overhead Door*, *McDowell*, and this interpretation generally. 126 Cong.Rec. H7899 (August

26, 1980) (remarks of Rep. Thompson). To hold that no contract has been formed also allows employers to enjoy the benefits of a pre-hire agreement, then later repudiate and completely avoid their own contractual obligations.

On the other hand, allowing a repudiation by the employer, but enforcing the contract until that repudiation occurs seems a correct reading of *Higdon*. A minority union will not be able to control an employment situation, because an employer can repudiate. Employers will be prevented from misleading unions into believing they intend to perform their contractual duties. Thus pre-hire agreements will be available to fill the void in the construction industry without allowing minority unions inappropriate leverage in this collective bargaining context.

On the balance, therefore, both from a policy standpoint and as a matter of interpretation of the Supreme Court's mandate, we find that § 8(f) pre-hire contracts are voidable by the employer until the union attains majority support. Until such a repudiation, however, the contract is fully enforceable in action under § 301 of the L.M.R.A.

McNeff, Inc. has argued that this holding creates a conflict in the law, since it will require the District Courts to make determinations regarding the majority status of a union at different times once it has made the finding that there has been a repudiation. It cites *South Prairie Construction Co. v. Local 627, International Union of Operating Engineers (Peter Kiewit)*, 425 U.S. 800, 96 S.Ct. 1842, 48 L.Ed.2d 382 (1976) for the proposition that these determinations are solely the province of the N.L.R.B. *Peter Kiewit* is, however, not controlling here. The Board has expertise in determining the majority status of a union at any given time. It has no apparatus for determining a union's past status. If there has been a repudiation, the crucial question is whether the union had previously attained majority status.

Re-creation of past relationships for the purpose of resolving factual disputes is one of the traditional functions of a trial court, and not a process in which the N.L.R.B. has any extraordinary expertise. Therefore, in this opinion we do not extend the District Court's jurisdiction into an area in which the N.L.R.B. exercises exclusive authority.

We need not resolve this issue, however, because it is clear that in this case the employer never repudiated the contract. The only act in the record which could possibly be argued to be a repudiation is the employer's failure to perform its contractual obligations. While it is clear that in some circumstances noncompliance can be so bald as to put the union on notice of the employer's intent to repudiate (*see*, e.g. *Higdon*, 88 L.R.R.M. 1067), the behavior here falls short. It is precisely this sort of action by an employer, enjoying the benefits of a pre-hire agreement and misleading the union as to the employer's intention of never performing its obligations, which has led us to adopt this view of the voidability of these contracts. There has been no repudiation, and this contract was enforceable for the period covered by the complaint.

McNeff, Inc. finally argues that there was no contract since it was coerced into signing the Master Labor Agreement. Appellant cites *Higdon*, 434 U.S. at 348, n. 10, 98 S.Ct. at 659, for the proposition that only pre-hire agreements which have been voluntarily entered into can be enforced. We need not decide here whether the union's tactics amounted to coercion, because the employer has raised this issue in the wrong way. The employer's remedy in the case of a coerced pre-hire agreement is the same as that for a minority union agreement. It must repudiate. To allow the employer to raise the issue of coercion now would be to do what we have just refused to do — allow the employer to enjoy the fruits of a pre-hire agreement and then challenge

it. Thus, if a § 8(f) agreement has been signed under coercion, it is still enforceable up to the time it is repudiated.

By the above analysis, the contract was fully enforceable up to the time the suit was filed. McNeff, Inc. must fulfill its contractual obligations, and the District Court's grant of summary judgment for the trustees is AFFIRMED.

APPENDIX B.
Summary Judgment.

United States District Court, Central District of California.

Frank L. Todd, et al., Plaintiffs, v. Jim Mc Neff, Inc., et al., Defendants. No. CV 79-1527-IH.

Filed: February 8, 1980.

There came before the Court for hearing on February 4, 1980, Plaintiff's Motion for Summary Judgment filed January 14, 1980, and Defendant's Motion for Summary Judgment filed January 21, 1980. Appearances were: For Plaintiffs Frank L. Todd, et al., Trustees of the Operating Engineers Health and Welfare Fund, Operating Engineers Pension Trust, Operating Engineers Vacation-Holiday Savings Trust, and Operating Engineers Training Trust, Wayne Jett, Lawyers, by Christopher M. Laquer, Esq.; for Defendants, Steven D. Atkinson, Esq.

The Court having considered the said Motions together with the Evidence, Points and Authorities, and other documents filed in support thereof and in opposition thereto, and having heard argument, finds there is no bona fide dispute of material fact. Defendant has not shown entitlement to judgment as a matter of law, and on that ground, the Court denies Defendant's Motion for Summary Judgment. The Court finds that Plaintiff has shown entitlement to judgment as a matter of law, and it is ORDERED that Plaintiff's Motion for Summary Judgment be granted. A transcript of the proceedings in open court on February 4, 1980, is ORDERED filed when produced, which transcript shall constitute the Court's Findings of Fact and Conclusions of Law.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Frank L. Todd, et al., as Trustees of the Operating Engineers Health and Welfare Fund, Operating Engineers Pension Trust, Operating Engineers Vacation-Holiday Savings Trust, and Operating Engineers Training Trust, shall have judgment against Defendant Jim Mc Neff, Inc., in the sum of $7,119.29, plus costs of suit in the sum of $_____ Said sum includes $1,802.50 as reasonable attorneys fees.

2. The Clerk shall transmit by U.S. mail copies of this Judgment to counsel for all parties.

DATED: February 8, 1980.

/s/ Irving Hill,
IRVING HILL, Judge
United States District Court

APPENDIX C.

Reporter's Transcript of Proceedings.

In the United States District Court, Central District of California.

Honorable Irving Hill, Judge Presiding.

Frank L. Todd, et al., Plaintiffs, vs. Jim McNeff, Inc., et al., Defendants. Case No. CV 79-1527-IH.

Los Angeles, California; Monday, February 4, 1980; 10:00 A.M.

* * *

(Other court matters.)

THE CLERK: Item No. 5, CV 79-1527-IH, Frank L. Todd, et al., v. Jim McNeff, Inc., et al.

Counsel, will you announce your appearances, please.

MR. LAQUER: Your Honor, Christopher M. Laquer for the plaintiffs. With me is Brian Hodge, an attorney in our office.

THE COURT: All right.

MR. ATKINSON: For defendants Steven D. Atkinson.

THE COURT: Have seats, please, gentlemen.

What we have before us today is reciprocal motions for summary judgment. Again following the usual practice, I want to list the evidence. The evidence consists of the following:

For plaintiffs we have the declaration of Mr. Majich, who attaches the trust agreements and the union agreements. We also have the declaration of Mr. McClendon, the auditor for the trusts. And plaintiffs seek total summary judgment not only on the issue of liability but for a specific amount. The amount sought — other than attorneys fees, which are also sought — is $5,316.79.

I don't understand the defendant, if plaintiff is found entitled to judgment, as questioning that $5,316.79. I see no evidence to question it.

Plaintiff prays for attorneys fees in addition, and in the amount of $1,802.50. And, again, I see no evidence from defendant which would question the amount of attorneys fees if plaintiff is found entitled to them.

Now, have I correctly stated your position and the evidence that you have submitted?

MR. LAQUER: Yes, your Honor.

THE COURT: Okay. The evidence for the defendant consists of a declaration of Mr. McNeff, the principal of the defendant corporation.

Attached to your points and authorities, Mr. Atkinson, are a number of documents from the NLRB.

I have to tell you that from a strictly formal point of view that that is not evidence. You have to have an affidavit or a declaration from somebody that identifies these things. I can't take judicial notice of such documents. That is not a court of record. And they are not, as far as I know, public records of the type of which judicial notice may be taken.

So you ought to have them identified in a formal affidavit or declaration.

However, I don't understand them as being disputed by the plaintiff in this case, and I propose to consider them in evidence even though they are attached to your points and authorities.

Is that agreeable?

MR. LAQUER: Yes, sir.

THE COURT: All right. Now, have I omitted any of your evidence?

MR. ATKINSON: No, your Honor.

MR. LAQUER: Your Honor, if I might make one provision. I do not object to the Court considering those documents as for what they stand for. However, we do contend that they are irrelevant.

THE COURT: Oh, I understand that. I am talking about not objecting to the form in which they were tendered.

All right. Now, I think I ought to say also that the defendant made no formal reply to the plaintiff's motion, treating its own motion as being the reply to plaintiff's motion. And I will treat it the same way. And plaintiff's motion will likewise be deemed to be the reply to defendant's motion. Although plaintiff formally replied, whatever is not in that reply but is contained in its own motion will be deemed as opposition material to the defendant's motion.

Now, the facts of this situation appear to be uncontradicted in every material way. This is the picture as drawn by the defendant's own affidavit. This contract involves the construction industry which for labor law purposes is the subject of an exemption and has been given special treatment under the NLRB statute and procedures. The exemption is found in Section 8(f) of the Act and is called Pre-Hire Agreements. And taking defendant's evidence in a most favorable light to him, this is the factual picture that appears: The defendant was a subcontractor on a job in progress. The general contractor's representative came to him and said that the defendant had to sign a contract with the union or leave the job. And the defendant agreed to sign the contract.

Under the pre-hire exemption of the statute a contract does not become binding unless and until a majority of the defendant's employees sign union membership cards. But the facts are uncontradicted that a majority did sign after the defendant went to them and told them — this is the

picture in the defendant's own affidavit — that they had to join the union or they couldn't work.

The defendant completed the job with those employees. But the defendant never honored the contract at all. There were these NLRB proceedings, which defendant says create a collateral estoppel. And the defendant is also making the claim here that the NLRB has primary jurisdiction of the case.

Now, that's the case. My tentative view is to deny the defendant's motion and to grant the plaintiff's motion.

The legal arguments that the defendant makes are in my view incorrect. The doctrine of collateral estoppel is not available to the defendant. There has been no adjudication in a judicial or judicial-type proceeding which would give rise to collateral estoppel. All that has happened is that the general counsel of NLRB has decided not to go forward on the union's claim of an unfair labor practice. That kind of determination by a lawyer who is like a prosecutor and who determines not to go forward does not give rise to collateral estoppel; and defendant has brought no authority that says it does.

In dictum, in the general counsel's letter deciding not to go forward, the general counsel gives as his opinion that the contract was not binding. That also does not bind this Court and gives rise to no collateral estoppel.

On the claim advanced by defendant that the Board has primary jurisdiction, the defendant is also incorrect. It's well established that although defendant's failure to honor a contract of this sort may be the subject of an unfair labor practice claim before the Board, as it was in this case, it is also the subject, may also be the subject of district court litigation in a Section 301 suit; and that the district court when that happens has jurisdiction to entertain the claim.

Jurisdiction would exist, it seems to me, even if the Board was in the middle of hearing the dispute. But in that event, the Court would probably stay its own decision until the Board disposes of the claim through the adjudicative process. And then maybe there could even be collateral estoppel, because there would be live testimony and adjudicative process.

But we don't have any of that here. The Board never heard this dispute in the adjudicative process. And jurisdiction in this Court clearly exists, and there is no basis to stay or stop that jurisdiction.

In the Higdon case, the Supreme Court, though in dictum, in my view clearly contemplated district court jurisdiction in just this situation.

As to plaintiff's motion, I would grant it because I would find there is no bona fide dispute of material fact. I would find that even giving every reasonable intendment to the defendant's evidence, that plaintiff has shown entitlement to judgment.

It is undisputed that McNeff signed the contract. It's undisputed that his three employees, which constituted all or a majority of his work force at the time, signed union cards. Thus, the contract on its face is valid and binding. And the defendant seeks to avoid liability on it on the ground that he misled his own employees, that he coerced his own employees into signing those union cards. And I am just of the belief that it does not lie in the defendant's mouth to avoid the effect of the contract, the effect of those people signing their union cards.

The employees conceivably would have a right to avoid their signature of the cards. I don't express any opinion on that. But defendant doesn't have a right to do it for them when he is the one who misled them. There is case law that

a coerced majority is not a true majority. But that rule of law is handed down where either the parties coerced are asserting this claim or the parties harmed by the coercion are asserting the claim; such party being not the coercer. So I do not think the case law applies to these facts.

Now, I am going to hear from you, Mr. Atkinson, since you are the apparent losing party. But I would like to hear what happened to the election held within the last week or ten days, and whether either of you think that changes anything about the current lawsuit. I haven't seen any new papers asserting that it changes anything.

What about you, Mr. Laquer? What happened at the election? And does it change anything, in your opinion?

MR. LAQUER: Well, your Honor, my contention is that it does not change anything as to this lawsuit. Because, first of all, the lawsuit covers a period prior to the election. The election itself is apparently mired down in challenges and objections.

My understanding is that an election was held, certain people cast votes —

THE COURT: But you don't know the results.

MR. LAQUER: I have not been advised of the results. And certain of the results, ballots have been impounded by the Board and —

THE COURT: The Board has to go through it and finally tell us what the results are.

MR. LAQUER: Yes.

THE COURT: Okay.

Now, I am going to hear from you, Mr. Atkinson.

MR. ATKINSON: Thank you, your Honor.

I think you have a good understanding of the Act. The Act was meant to protect employees. And generally, they

entered into a contract, which was entered into between the union and Mr. McNeff, that would be unlawful, both on behalf of Mr. McNeff and the union. The 1959 exception of the law was passed, Section 8(f) which allowed contracts to be entered into, where they were entered into voluntarily, and if afterwards the union obtained majority status.

I think I disagree with the Court on several key issues here. As plaintiff indicated in its moving papers in response to mine, the Court would as a factual matter have to determine whether the contract was voluntarily entered into.

I do not believe McNeff's declaration establishes it was voluntarily entered into.

THE COURT: I don't follow you. He says that the general representative came over and said, "Either sign it or you have to leave the job."

MR. ATKINSON: Well, he was first approached by the union, who told him he had to sign or be kicked off the job. He was then approached by the superintendent, accompanied by the union representative, who reiterated that he either sign that contract, or he was being kicked off the job.

I would submit that "voluntariness" obviously is a word of art. But in labor relation's definition, that that is not construed to be voluntarily as envisioned when passage of the statute —

THE COURT: Well, where is the authority about that?

MR. ATKINSON: Your Honor, the authority about that, I would have to —

THE COURT: He signed it. He knew what he was signing. And if he decided that he wanted to stay on the job, and not defy the general, I don't see where that constitutes a coercion. Is there some authority that it might? I will look at it.

MR. ATKINSON: Your Honor, I think what you need to do is to review the legislative history of 8(f). You will determine, I believe, upon reviewing it that 8(f) was passed with one specific situation in mind. For example, if I were from Georgia, which I am, and we were going to build a power plant in California, I would not have a work crew. I would not be able to go to this union and obtain employees unless prior to obtaining those employees I signed a contract. Normally, that would be illegal. However, in the construction industry, to obviate this problem whereby you needed to obtain skilled employees and could not obtain them unless you had a contract, that you could sign that contract if you went to the union voluntarily and said, "I want to hire union operators. I am going to sign this contract, and you send me the union operators."

That is a factual situation for which this exception was passed. And I would submit that that factual situation does not exist here. Instead, this employer did not want — he already had a crew of employees. He did not want to sign that union contract. However, because of the financial position he found himself in, he did not believe that he could afford to be kicked off that job.

THE COURT: That is not in his affidavit, either.

MR. ATKINSON: Well, I realize it's not, your Honor. Perhaps the affidavit is inartfully drawn.

THE COURT: That's all the evidence I have.

MR. ATKINSON: Perhaps then as the plaintiff has stated in its response, responding memorandum, that that issue is still a question of fact and should be set for hearing, as to the voluntariness.

THE COURT: Plaintiff has conceded that?

MR. ATKINSON: I believe they did, your Honor, in their reply memorandum.

THE COURT: And that they are not entitled to a summary judgment motion? I don't remember such a concession. If you are through, we will find out.

MR. ATKINSON: I have some other points that I would like to cover, if I may, your Honor.

THE COURT: Well, let's find out now, though. Have you made such a concession?

MR. LAQUER: No, your Honor.

THE COURT: Very well.

Go ahead, Mr. Atkins. What did you have in mind? Do you want to show me where that concession is supposed to have occurred?

MR. ATKINS: Well, no, your Honor. I was going to refer to his memorandum here in which I believe he stated three factual issues needed to be decided by the Court.

THE COURT: Well, you will have to show me what you have in mind as a concession by the plaintiff. What document are you going to be looking at?

MR. ATKINSON: I am referring to the document that was filed, I believe, January 27th, or so, your Honor.

THE COURT: Hold on. Is that in his reply?

MR. ATKINSON: Yes, your Honor.

THE COURT: That's filed January 24th. What page?

MR. ATKINSON: Page 7, your Honor.

(Court reading.)

THE COURT: I will have Mr. Laquer explain what is going on with this argument when his turn comes. Go ahead.

MR. ATKINSON: Thank you, your Honor.

Your Honor has also determined that the union did represent a majority. I would submit that the Court —

THE COURT: That is uncontested, isn't it, —

MR. ATKINSON: No, it is not, your Honor.

THE COURT: — that three cards were signed, and at most there were five. Isn't that right?

MR. ATKINSON: No, your Honor, it's not.

Let me explain, if I may, the concept of majority status that is envisioned in the National Labor Relations Act.

Majority status to be determined must first determine what the appropriate collective bargaining unit is.

THE COURT: Wait. Before you tell me the law, tell me the facts. The facts here are undisputed that three employees signed. Isn't that true?

MR. ATKINSON: That is true.

THE COURT: At that time there is some unclearness, but at most there were five.

MR. ATKINSON: At that time I believe there were only three, your Honor.

THE COURT: Okay.

MR. ATKINSON: Your Honor, however, those were not all the eligible employees which had a right to vote, and whether or not the union was a majority representative —

THE COURT: Where is that in the evidence?

MR. ATKINSON: That is not in the evidence anywhere.

THE COURT: Then I can't consider it. Proceed.

MR. ATKINSON: Well, your Honor, if I may just explain the election procedure —

THE COURT: It becomes irrelevant, doesn't it? We have three, which are all three at that time signing. That's the evidence. Is there anything else you want me to look at factwise?

MR. ATKINSON: Yes, your Honor, there is.

THE COURT: What is it? And where is it in the evidence?

MR. ATKINSON: It is not submitted in the evidence, your Honor.

THE COURT: Then I can't look at it. End of discussion.

MR. ATKINSON: Well, your Honor, all I would point out to the Court —

THE COURT: Don't you understand that a summary judgment motion is decided on evidence?

MR. ATKINSON: I understand completely that it is decided on evidence, your Honor. And I obviously have not artfully put the summary judgment motion together. However, I did rely to some extent on the Peter Kiewit decision, which holds by the Supreme Court that federal courts have no authority to make a determination on what is the appropriate bargaining unit. And I also believe, based on that decision, and the Ninth Circuit's decision in Waggoner, that the Court has no authority to determine majority status. That is left solely to the Board's expertise, determining which employees should be allowed to vote, and what the criteria for eligible voters should be. And just because three people at one point in time were in fact union members, does not, as far as the National Labor Relations Board is concerned, establish majority representation.

There are many other factors which must be determined before you can make a determination as to whether or not a group of employees is in fact represented by the union.

THE COURT: I just don't agree with you. If the jurisdiction exists under 301, then the Court has to have the right to determine factually whether the contract came into being, namely, whether it was signed by a majority.

Go ahead.

MR. ATKINSON: Well, your Honor, I think those two decisions are the key to my argument, Peter Kiewit and Waggoner, wherein I agree with the Court — the Court under 301 has the ability, indeed it must determine what provisions of the contract mean. However, I would assert

that the determination of the validity of this contract must turn on two issues. The first issue is —

THE COURT: You seem to be arguing the exclusive jurisdiction issue now. Right?

MR. ATKINSON: Well, your Honor, first you must determine what the appropriate collective bargaining unit is. Then you must determine whether or not in fact the union was a majority representative. And I do not believe that the Court under Peter Kiewit is empowered to make those determinations. I believe they are solely within the province of the Board, at least as far as primary jurisdiction is concerned.

I would also point out that the NLRB looked into this matter and found obviously that there was not a contract valid under —

THE COURT: I don't agree with you. The general counsel in dictum in a decision in which he says I am not going to proceed, said what it looked like to him. That is not a finding of the NLRB.

MR. ATKINSON: I agree with your Honor. There has been no finding by the NLRB. However, the NLRB —

THE COURT: The NLRB isn't a court. There has been no finding by the Board.

MR. ATKINSON: Excuse me, your Honor. I apologize. There has been no finding by the Board.

THE COURT: Okay. Why do you keep on saying there was one?

MR. ATKINSON: I am sorry, your Honor. I must be nervous. However, the NLRB did determine that there was no contract bar to the election, and did decide to hold an election to determine whether or not McNeff's employees desired to be represented by the union. The result of that election was three employees voted against the union and

one employee voted for the union. There were three other employees who attempted to cast ballots, one of whom had worked for McNeff in '78 and —

THE COURT: Well, that is not before me. I am sorry. That is not before me at all.

MR. ATKINSON: Well, your Honor had asked what the results of the election were.

THE COURT: Okay. And I take it you are not dissenting — maybe I should not have asked it because it is irrelevant to my task today. But I take it that you don't dissent from what Mr. Laquer said, which is that, well, we don't know the result of the election yet. The Board has to —

MR. ATKINSON: I would agree with Mr. Laquer. There has not been a final —

THE COURT: Let's stop it right there.

I want to hear from the other side now.

MR. ATKINSON: Thank you, your Honor.

Mr. LAQUER: The Court has asked me to reply to what my reply means?

THE COURT: Yes. What is that all about? It's rather difficult for you to say, "For my motion there isn't any dispute of fact; but for his motion there is." It's a little inconsistent.

MR. LAQUER: It's slightly inconsistent, your Honor. It's based on my examination of the declarations by Mr. McNeff and my reading of those declarations, and attempting to interpret the facts from those declarations.

My interpretation was, as I said at the end of that section, that we didn't believe that there was any disputed question of fact. However, if the Court read those declarations differently —

THE COURT: You see, I find it very, very difficult strategy and litigation posture to do what you did. You say for the purposes of your own motion that on these very factual issues there is no bona fide dispute of material fact. Isn't that what you are saying?

MR. LAQUER: Yes, I do.

THE COURT: And then you say, "That's for my motion. But for his motion, I take a different view. There is a bona fide dispute of material fact."

And the facts that are involved, the questions are the same, aren't they?

MR. LAQUER: Yes, they are.

THE COURT: Then you will have to tell me how in a pleading — in a pleading — one can take inconsistent positions. Because one doesn't yet know what the facts are going to turn out to be.

In a motion for summary judgment, with a factual record right in front of you, and especially in your reply, so you know all the facts, how do you take an inconsistent position?

MR. LAQUER: Well, your Honor, I didn't believe that it was inconsistent at the time I prepared the reply. The reason why I prepared the reply was if the Court believed Mr. McNeff's declaration or interpreted it to mean that he didn't voluntarily sign what he said he signed, then that would be a material question of fact.

I didn't believe it was. And that is why I said determines — I thought I put a proviso on this in the beginning and in the end of that section to alert the Court that that was not —

THE COURT: Now, let's be very candid. Do you know any authority that would indicate that on these facts that might be called coercion of a type that would void the

contract, this business about the union representative? If it does, then we will have to have a trial on the issue.

MR. LAQUER: I do not.

THE COURT: It may be operating under some misapprehension, but was it not the general's prerogative, general contractor, to say, "I want this to be a union job," —

MR. LAQUER: Yes, it is.

THE COURT: — "and if you don't go along with the union and sign this contract, I am sorry, I can't use you."

MR. LAQUER: It is.

THE COURT: Is that not what happened, on his own evidence?

MR. LAQUER: Yes. That is what happened.

THE COURT: And isn't it clear that that does not constitute coercion of a type that would permit avoidance of the contract?

MR. LAQUER: Yes, sir.

THE COURT: That's the way it appeared to me. And I am going to disregard as surplusage this business at the end of your memorandum. But I urge you in the future to give some very careful analytical thought to what your last paper may look like in comparison with and put in juxtaposition of your prior papers.

You understand that.

MR. LAQUER: Yes, I understand it, your Honor.

MR. ATKINSON: Your Honor, if I may make one further comment.

THE COURT: No. No further discussion is indicated.

MR. ATKINSON: I just wanted to address the Court on the issue of voluntariness.

THE COURT: No further discussion is indicated.

I find that there is no bona fide dispute of materiál fact. I find that plaintiff has shown entitlement to judgment. I grant plaintiff's judgment as prayed in the amounts prayed, including the attorneys fees.

Defendant's motion for summary judgment is denied. The defendant has not shown entitlement to judgment as a matter of law.

I am ordering — or, I want to order, please, Mr. Laquer, a transcript, which will constitute my findings and conclusions —

MR. LAQUER: I will so order, your Honor.

THE COURT: — and an explanation of my reasoning. And we will prepare the judgment.

Now, we haven't heard from the other counsel yet, Mr. Clerk. So we will take a recess until we hear from them. Maybe you can round them up.

(Short recess.)

* * *

CERTIFICATE.

In the United States District Court, Central District of California.

Frank L. Todd, et al., Plaintiffs, vs. Jim McNeff, Inc., et al., Defendants. No. CV 79-1527-IH.

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Central District of California.

I further certify that the foregoing 22 pages are a true and correct transcript of the proceedings had in the above-entitled cause on Monday, February 4, 1980, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 19th day of March, 1980.

/s/ Don P. Cram
Official Reporter

APPENDIX D.

[Letterhead]

July 10, 1979

Julius Reich, Esq.
Reich, Adell, Crost & Perry
501 Shatto Place, Suite 100
Los Angeles, CA 90020

Re: Jim McNeff, Inc.; Jim McNeff
Trucking and Equipment Rental,
joint employer
Case 21-CA-17870

Dear Mr. Reich:

The above-captioned case charging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

As a result of the investigation, it does not appear that further proceedings on the charge are warranted. There is insufficient evidence to establish that the Employer violated Section 8(a)(5) and (1) of the Act. While the parties may have executed an agreement arguably within the meaning of Section 8(f) of the Act, in September 1978, it does not appear that a full Section 9(a) collective-bargaining relationship has been established. In this regard, the contract is less than 1 year old and it appears that the Employer repudiated the contract from its inception. Additionally, the signing of the agreement and the Employer's subsequent instructions to his employees to join the Union appear to have been merely surface gestures to satisfy the Union and to protect the Employer's position on a then on-going construction project and did not signify the Employer's intent of entering into a collective-bargaining relationship. I am, therefore, refusing to issue a complaint in this matter.

Pursuant to the National Labor Relations Board Rules and Regulations, you may obtain a review of this action by filing an appeal with the General Counsel addressed to the Office of Appeals, National Labor Relations Board, Washington, D. C. 20570, and a copy with me. This appeal must contain a complete statement setting forth the facts and reasons upon which it is based. The appeal must be received by the General Counsel in Washington, D. C., by the close of business on July 23, 1979. Upon good cause shown, however, the General Counsel may grant special permission for a longer period within which to file. Any request for extension of time must be submitted to the Office of Appeals in Washington, and a copy of any such request should be submitted to me.

If you file an appeal, please complete the notice forms I have enclosed with this letter and send one copy of the form to each of the other parties. Their names and addresses are listed below. The notice forms should be mailed at the same time you file the appeal, but mailing the notice forms does not relieve you of the necessity for filing the appeal itself with the General Counsel and a copy of the appeal with the Regional Director within the time stated above.

Very truly yours,

/s/ Wilford W. Johansen
Wilford W. Johansen
Regional Director

Enclosures
CERTIFIED MAIL
RETURN RECEIPT REQUESTED
cc: (See attached sheet.)
cc: General Counsel
National Labor Relations Board
Washington, D. C. 20570

Local No. 12, International Union
of Operating Engineers, AFL-CIO
3055 Wilshire Boulevard
Los Angeles, CA 90010

Jim McNeff, Inc.; Jim McNeff
Trucking and Equipment Rental,
joint employer
94-241 National Avenue
Mecca, CA 92254

Steven D. Atkinson, Esq.
1300 Dove Street, 2nd Floor
Newport Beach, CA 92660

APPENDIX E.

[Letterhead]

November 8, 1979

Re: Jim McNeff, Inc.; Jim McNeff
Trucking and Equipment Rental,
Joint Employer
Case No. 21-CA-17870

Ralph M. Phillips, Esquire
Reich, Adell, Crost and Perry
501 Shatto Place, Suite 100
Los Angeles, California 90020

Dear Mr. Phillips:

Your appeal from the Regional Director's refusal to issue complaint in the captioned case has been duly considered.

The appeal is denied. Under all the circumstances, including the evidence that the Employer was forced by the general contractor to sign the 8(f) agreement after union agents appeared on the job site; that the Employer required the employees to join the Union; that the Employer repudiated the 8(f) agreement immediately after signing it, and never implemented any of its terms; and that the Union did not object to the Employer's repudiation until June 1979, it was concluded that the burden of establishing that the Employer had violated Section 8(a)(5) and (1) by refusing to apply the 8(f) agreement could not be sustained.

Very truly yours,

Norton J. Come
Acting General Counsel
By /s/ Mary M. Shanklin
Mary M. Shanklin
Acting Director
Office of Appeals

cc: (See next page)

Re: Case No. 21-CA-17870

cc: Director, Region 21

Local No. 12, Int'l union of Operating Enginers, AFL-CIO, 3055 Wilshire Blvd., Los Angeles, California 90010

Jim McNeff, Inc.; Jim McNeff Trucking and Equipment Rental, joint employer, 94-241 National Avenue, Mecca, California 92254

Steven D. Atkinson, Esquire, 1300 Dove St., Second Floor, Newport Beach, CA 92660

APPENDIX F.
Supplemental Decision and Certification of Results of Election.

United States of America Before the National Labor Relations Board.

Jim McNeff, Inc. Employer-Petitioner and International Union of Operating Engineers, Local No. 12, AFL-CIO Union. Case 21-RM-1967.

Mecca, Calif.

On August 22, 1980, the National Labor Relations Board issued a Decision and Order in the above entitled proceeding in which the Board, *inter alia*, ordered that a hearing be held to resolve the issues raised by the Union's objection.

Pursuant thereto a hearing was held and, on October 27, 1980, the Hearing Officer issued and served on the parties her Report and Recommendations. In her report, the Hearing Officer recommended to the Board that the Union's objection be overruled in its entirety and that a certification or results be issued.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the Board has delegated its powers in connection with this proceeding to a three-member panel.

No exceptions to the Hearing Officer's report were filed by either party within the time provided therefor. We, therefore, adopt the Hearing Officer's recommendations as contained in her report. Accordingly, the Union's objection is hereby overruled in its entirety.

As the Union failed to receive a majority of the valid ballots cast, we shall certify the results of the election.[1]

---

[1]The tally of ballot shows that there were approximately 7 eligible voters and that 7 ballots were cast of which 1 was for the Union, 3 was against the Union and 3 were challenged. The challenged ballots are sufficient in number to affect the results of the election.

CERTIFICATION OF RESULTS OF ELECTION

IT IS HEREBY CERTIFIED that a majority of the valid ballots has not been cast for International Union of Operating Engineers, Local No. 12, AFL-CIO, and that said labor organization is not the exclusive representative of all the employees, in the unit herein involved, within the meaning of Section 9(a) of the National Labor Relations Act, as amended.

Dated, Washington, D.C., November 17, 1980.

Howard Jenkins, Jr., Member
John A. Penello, Member
John C. Truesdale, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)